

Testimony of
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Testimony of Tom Malinowski, Washington Advocacy Director, Human Rights Watch:

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"The Legal, Moral, and National Security Consequences of 'Prolonged Detention'"

Mr. Chairman, thank you for calling us together today and for inviting me to testify. Any conversation on the topic of prolonged preventive detention begins with a point on which all sides agree: Under the laws of war, enemy combatants captured in an international armed conflict can be detained without charge for the duration of that conflict. But the situation we are talking about here is different, for two reasons. First, in a traditional war between states, it is easy to place boundaries around the extraordinary power to detain without charge, so that governments do not take it as a license to detain preventively anyone who they think poses a national security threat. In a traditional war, it is clear where the battlefield is, who enemy combatants are, and how to define the conflict's endpoint.

But in this campaign against international terrorists, which has no geographic boundaries or clear distinction between civilians and combatants, it is hard to limit preventive detention to people who are plainly soldiers in a war. The US Congress has never formally established a system of detention without trial to deal broadly with national security threats. Not during the Civil War, or during World War II, or during the Cold War, even though in all these cases the survival of the nation was clearly at risk. If Congress were to establish such a system today, based on an expanded notion of wartime detention authority, in a national security crisis presidents could exploit it to detain a broad range of enemies based on a prediction of future dangerousness. Other countries engaged in their own "wars on terror" (like Russia, China, or Sri Lanka) could also mimic US arguments to justify detaining without charge anyone they accuse of terrorist links, and seizing them anywhere in the world, including on U.S. soil. This is something everyone on both sides of this debate should want to avoid.

Second, in a traditional war, preventive detention is allowed because it is the only way to keep enemy combatants from returning to the battlefield. They may be prosecuted only for having committed war crimes, but not for participating in the conflict. Detention without charge is broadly accepted because it is the only conceivable form of detention.

But for the detainees at Guantanamo, detention without charge was not the only option. Those whom the Obama administration will likely want to continue detaining allegedly were involved in activity that is a crime -- committing or planning acts of terrorism, conspiring to commit acts of terrorism, or providing material support for terrorism. Consider the detainees that President Obama suggested might be candidates for preventive detention in his speech on Guantanamo two

weeks ago, including: "people who have received extensive explosives training at al Qaeda training camps, commanded Taliban troops in battle." Under existing material support and terrorism laws, it should, in principle, be possible to prosecute most such people. Even Taliban fighters captured on the battlefield in Afghanistan today and found to have no connections to al Qaeda or terrorism, can be prosecuted (most appropriately by the government of Afghanistan) for violating Afghan criminal law.

So why are we considering preventive detention for Guantanamo detainees today? It is not for the reasons we would employ it in a traditional war. It is not because these detainees are prisoners of war who can only be kept off the battlefield via preventive detention. It is because some people think that the option of prosecution, which clearly existed, may now be harder to exercise because these prisoners were kept for years in an illegitimate system, because the previous administration did not believe it needed to gather and preserve evidence in ways that would facilitate prosecution, and because some of the evidence that remains was tainted by torture or is considered too sensitive to be used in court.

Setting aside for a moment whether criminal prosecution is still possible in these cases or not, I believe that President Obama is right to say that the problems we are experiencing in deciding what to do with the detainees in Guantanamo result not from his decision to close the detention facility, but from the original decision to open it.

We would not be facing a dilemma today if the Bush administration had from the start brought to justice all those Guantanamo detainees who were reasonably suspected of having criminal links to terrorism -- as it did with Zacharias Moussawi, with the "shoe bomber" Richard Reid, and, once the courts forced its hand, with Jose Padilla.

In these last few years, whenever America's established institutions of justice have been given a chance to deal with this challenge, they have passed the test. The civilian federal courts have prosecuted dozens of people accused of involvement in international terrorism. These trials have often been complicated and difficult. Some have been messy. But time and again, they have succeeded. They have disrupted conspiracies and attacks. They have put dangerous people away. They have given us finality in a way that is widely seen as fair.

It is the other system -- the experimental, improvised, repeatedly challenged system of preventive detention in Guantanamo that has failed. It is the detainees who have been sitting in that system who pose a problem today -- not because of who they are but because of how they were handled in the past.

One conclusion we can draw from this is that a permanent system of preventive detention -- used to detain without charge suspected members of al Qaeda who are captured in the future -- is not needed. The administration can avoid such a system by avoiding the mistakes of its predecessor. When it captures a suspected terrorist dangerous enough to be brought to the United States and detained for a long period of time, it can choose to conduct interrogations lawfully, to handle evidence properly, and to move with reasonable speed towards criminal prosecution. In his speech on detention policy, this is what President Obama suggested would happen in the future. When he referred to the possible need for preventive detention without trial, he was clearly

speaking only about existing detainees in Guantanamo Bay.

But what about the legacy cases - those detainees currently in Guantanamo who the administration may conclude are too dangerous to release, but who have been rendered "hard to prosecute" by the policies of the last eight years?

I don't believe that "hard to prosecute" is the same thing as "impossible to prosecute." The federal courts have developed procedures over the last few years that should give us confidence they can handle these complex cases effectively, striking a pragmatic balance between the government's interest in protecting classified information, and the need to preserve the fairness and legitimacy of criminal proceedings. An administration committed to criminal prosecution as a priority would make the effort required to develop evidence that could be used in criminal trial. And if such evidence does not exist for a particular detainee, it is hard to imagine that holding him without trial could ever be considered legitimate.

I say this not to minimize the difficulties and dilemmas the administration faces. But it is clear that the federal courts have a good track record in dealing with these cases - and that this option has not yet been tried for those suspected terrorists who were placed in Guantanamo. Before we once again consider experimenting with a system of detention without charge, I believe that the option of using established criminal justice institutions should be exhausted. And the benefits of experimenting with such a system should be weighed against its considerable costs.

If the Committee is ever asked to consider such a proposal, let me suggest a few hard questions that I hope you will ask.

First, can Guantanamo detainees be moved to a new system of detention without trial in the United States without making it seem like Guantanamo was being transplanted to U.S. soil? Would such a new system repair the damage Guantanamo has done to America's reputation, or perpetuate it?

Closing Guantanamo will bring the United States plenty of short-term credit. But the price America has paid for Guantanamo is not fundamentally related to its physical location. In the eyes of the prison's American and foreign critics, the essence of Guantanamo is a system of detention without charge extended to people captured outside a conventional battlefield, combined with military tribunals that did not meet US or international standards of justice.

Theoretically, one could design a system of preventive detention that affords detainees such a high level of due process and judicial review that it would not look like Guantanamo, or even Guantanamo-lite. But if you allow protections similar to those already provided by federal courts and courts martial, why go to the trouble of creating a new system at all?

The only point of establishing a preventive detention system is to lower standards to a point where it can deal with people who cannot be prosecuted in the criminal system. That is why almost all proposed preventive regimes assume, for example, that the person presiding could consider classified evidence never presented to the suspect. This would make it virtually impossible for defendants to challenge that evidence, and statements obtained through coercion

could be concealed and relied upon.

The temptation would be great to exploit the proceedings' secrecy and reduced standards of evidence to pursue people with only tenuous connections to terrorist activity. Inevitably, errors would be made; some innocent people would be detained based on faulty intelligence or mistaken identity. Journalists and lawyers would uncover these mistakes. And once again, people around the world would focus on the injustices the United States commits, not on the crimes the terrorists commit. Except this time, the principle of detention without charge would be part of the regular practice of the U.S. government and embedded in the law of the land forever. This would not solve Guantanamo; but make the problem permanent.

A second question is whether one can create a new form of preventive detention without enduring more years of frustration and delay?

The military commissions system currently in place was invented by White House lawyers after 9/11, then reinvented after it was challenged by critics within and outside the Bush administration, then reinvented again after the Supreme Court's Hamdan decision. If the Obama administration follows through on its desire to keep military commissions as an option, it will have to reinvent the system yet again. And yet in all this time, the commissions have failed to bring a single important terrorist to justice.

The detention system in Guantanamo has also gone through numerous changes. Combatant Status Review Tribunals were established, and then struck down as inadequate by the courts. Habeas corpus challenges were brought before federal judges; then the Congress stripped those judges of their jurisdiction; then the Supreme Court restored it. Seven years after Guantanamo opened, a stable set of rules for determining who should be detained and with what degree of due process has still not emerged.

Some of these problems are due to the inherent flaws of the system. But many are the inevitable result of creating any new system from scratch, especially one that deviates so much from standards with which US courts are comfortable and American lawyers are familiar. America's civilian criminal justice system, on the other hand, has been around for more than 200 years. The Uniform Code of Military Justice has been around for almost 60. We've had all that time to get the kinks out of the system, to establish stable rules, to train a cadre of lawyers and judges who know those rules, and to develop special procedures for special kinds of cases, including those involving terrorism.

If we try again to create a new system from scratch, if we rely again on trial and error to work out the rules, the result will again likely be more error than trial. Eventually, stable rules may emerge, after all the legal challenges and legislative re-dos are exhausted. But how long should we be prepared to wait to get to that point? Five years? Ten years? Can the United States afford more years of controversy over how to detain suspected terrorists?

A third question I hope you'll ask is whether the risk of releasing truly dangerous people would be lower with a preventive detention system, or higher?

Now, that may sound like a counter-intuitive question. Surely, the whole point of a preventive system is to detain people who might otherwise be released by ordinary courts, with their higher standards of evidence and due process. But the answer is not as obvious as it may seem.

If a system of preventive detention is established, it will always be easier in the short term for the government to put suspected terrorists through such a system than to prosecute them before civilian courts. The government will have a strong incentive to use this parallel system even for those detainees who could be prosecuted in criminal courts. After all, why go to the trouble and expense of a trial, which might require declassifying evidence, and even the risk of an acquittal, when you have a more expedient option?

At the same time, because the new preventive detention system would likely face tremendous legal challenges as well as domestic and international criticism, the government will eventually feel pressure to move detainees out of it. This is precisely what happened in Guantanamo. At first, setting up the camp looked like a good way to avoid the uncertainties of the criminal justice system; the Bush administration could put who it pleased there and control their fate for as long as it pleased. But when Guantanamo became controversial, the administration started trying to move people out of it. It sent hundreds of detainees back to their home countries, including a number of apparently very dangerous men who might well be sitting in a federal prison right now had they been brought before a criminal court at the start.

The Obama administration may face similar pressures if it continues to hold detainees without trial, and the practice proves as controversial as it has been in the past. Meanwhile, detainees will be able to fight for their release by attacking the legitimacy of the system, an opportunity they would not have in civilian court. And some of those challenges could succeed.

Any system that lacks legitimacy is likely to result in more potentially dangerous people being released sooner than a system that is unassailable, like our criminal courts. The lesson is that here, as in so many aspects in life, the short-term expedient solution is self-defeating in the long-term.

A fourth question is whether a preventive detention system would effectively delegitimize terrorists in the way that the criminal justice system does?

One thing all terrorists have in common is the desire not to be seen as ordinary criminals. Al Qaeda members clearly want to be thought of as soldiers, as part of a great army at war with a superpower on a global battlefield. They crave the attention and, in their own minds, the glory that comes with that status, and they use it to recruit more misguided young men to join their cause. Remember how the 9/11 mastermind Khalid Sheikh Mohammed behaved before his Combatant Status Review Tribunal at Guantanamo Bay. He wore his designation as an "enemy combatant" proudly, comparing himself to George Washington and saying that had Washington had been captured by the British, he, too, would have been called an "enemy combatant." In a sense, the Guantanamo tribunal gave Khalid Sheikh Mohammed exactly the status that he wanted.

In contrast, consider how upset the convicted "shoe bomber," Richard Reid, was when he was

brought before an ordinary court in Boston back in 2003, how he demanded to be treated as a combatant, and how the judge in that case, William Young, put him in his place by saying: "You're no warrior. I know warriors. You are a terrorist" -- as he sentenced Reid to life in prison. Isn't this a far better way to deal with such men, to let them fade into obscurity alongside the murderers and drug traffickers who populate our federal prisons?

As counterterrorism expert Mark Sageman has written: "Any policy or recognition that puts such people on a pedestal only makes them heroes in each others' eyes and encourages others to follow their example." The best system for dealing with suspected terrorists is the system that makes them feel the least special. The criminal justice system passes that test. A brand new system of preventive detention designed just for members of al Qaeda would fail it miserably. It would reinforce al Qaeda's narrative that terrorists are warriors, and fuel the notion that these men deserve special treatment and status. The risk would be compounded by the likelihood that such detainees would receive regular reviews of their detention keeping their names and cases in the press and making them poster children for advocacy and recruitment efforts alike. By comparison, the criminal justice system provides closure, allowing convicted terrorists to largely disappear from the public eye.

That leads me to a final question: Would a preventive detention system actually prevent terrorism?

One thing we need to keep in mind is that the 241 men currently detained in Guantanamo are not the biggest problem we face in dealing with the terrorist threat, not by a long shot. I am concerned about these 241, but I am much more concerned about the vastly larger number of young men with very similar profiles who are at large in the world and could potentially do us harm. After all, many thousands of young men committed to helping the Taliban passed through Afghanistan before 2001, staying in the same camps and guest houses and developing the same associations as those now detained in Guantanamo. Many more subscribe to the extremist ideology that gave rise to al Qaeda; they read the literature, surf the websites, watch the videos, and may be potential recruits to suicide squads or terror cells. If U.S. troops swept today through a city like Kandahar, Afghanistan, or Karachi, Pakistan, and detained and interrogated the first thousand young men they encountered, they would probably find a few dozen at least who fit the profile of scary-but-hard-to-prosecute that we are discussing today. And we are not going to detain them all unless we want to build a thousand Guantanamos.

If you believe that incapacitating a few dozen potentially dangerous people currently in Guantanamo out of the thousands of such people at large in the world weakens al Qaeda then the answer to my question is yes - preventive detention will prevent terrorism.

But if you agree with Gen. David Petraeus that the fight against non-traditional foes like al Qaeda "depends on securing the population, which must understand that we, not our enemies, occupy the moral high ground," the answer is clearly "no." It is "no" if you believe the U.S. Army's Counterinsurgency Manual, which warns that "punishment without trial is an illegitimate action that enemies exploit to replenish their ranks." It is "no" if you look at the websites that use images of Guantanamo to recruit more fighters to the terrorists ranks. It is "no" if you believe the April 2006 National Intelligence Estimate, which argues that to defeat al Qaeda, the United

States needs to "divide [terrorists] from the audiences they seek to persuade" and make "the Muslim mainstream . . . the most powerful weapon in the war on terror."

There is, unfortunately, no shortage of potential suicide bombers in the world. Guantanamo has made that problem worse, not better. We talk about not returning detainees to the fight, but what we need to remember is that Guantanamo has recruited people to the fight. It has probably created far more enemies than it has taken off the battlefield. If a new system of preventive detention is seen as another departure from America's commitment to the rule of law, the problem will be compounded.

The experience of America's allies is often cited to justify preventive detention regimes. But that experience is far from encouraging. Between 1971 and 1975, for example, the British army rounded up close to 2,000 people it believed to be associated with the Irish Republican Army (IRA) and interned them in prison camps, where they were held without charge. Violence increased as anti-detention anger helped fuel the conflict.

Years later, the home secretary, Reginald Maudling, who sanctioned the internments, said the experience "was by almost universal consent an unmitigated disaster which has left an indelible mark on the history of Northern Ireland." In the words of former British Intelligence officer Frank Steele, who served in Northern Ireland during this period: "[Internment] barely damaged the IRA's command structure and led to a flood of recruits, money and weapons." Even Edward Heath, the British prime minister in 1971, when internment was introduced, later called it a "mistake which gave the IRA a way to recruit from amongst people who had been interned, and proved impossible to stop."

Mr. Chairman, there are no easy, expedient answers to the question of what to do with the remaining detainees in Guantanamo. But for those who are not sent home (which is likely the best answer for most), the US criminal justice system offers the best alternative.

In a sense, the United States has been running a controlled experiment for the last seven years in how best to bring suspected terrorists to justice. And the results are clear.

Those accused men who have been brought into the civilian system are, to use one of President Bush's favorite expressions, no longer a problem for the United States. If guilty, they have been convicted, put away, and largely forgotten. They are not being used for propaganda purposes by groups like al Qaeda. Their treatment has reinforced America's status as a nation of laws, not undermined it.

Meanwhile, every single person who was put through the alternative preventive detention system at Guantanamo remains an enormous problem for the United States.

The lesson is equally clear. We should stop experimenting. We should not build yet another untested structure on a foundation of failure. We should finally, at long last, bring to justice the men who killed thousands of people on September 11, and others who have committed or planned or aided the murder of Americans. And we should do it in a system that works.